A

NATCHA DABKAEW

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: K-05-177-07-2012]

C

9 SEPTEMBER 2013

CRIMINAL LAW: *Dangerous drugs - Trafficking - Accused person convicted for charge of trafficking in 18630g of cannabis - Sentenced to death - Appeal against conviction and sentence - Whether defence mere*

D

denial - Discrepancy in weights of drugs exhibits - Whether explained - Whether there was break in chain of evidence - Whether trial judge appreciated defence and cautioned statement - Whether there was non-direction amounting to misdirection - Dangerous Drugs Act 1952 s. 39B(1)(a)

E

CRIMINAL PROCEDURE: *Exhibits - Break in chain of evidence - Accused person convicted for charge of trafficking in 18630g of cannabis and sentenced to death - Discrepancy in weights of drugs exhibits - Whether explained - Whether there was break in chain of evidence - Whether conviction and sentence safe*

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The appellant, a Thai national, was charged for trafficking in 18630g of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. A customs officer ('SP4') who had checked the taxi where the appellant was a passenger, had found

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two locked luggage bags at the taxi booth. Upon examination, both luggage bags were discovered to contain 20 four square ('the packets') objects wrapped inside t-shirts. In her cautioned statement, which was one of mere denial, the appellant denied having knowledge of the drugs. According to the appellant, while

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having a drink in Changloon, she was approached by an African man who asked her the purpose of her visit. When the appellant told him that she was looking for a job, the African man told her that he ran a clothing business in Bangkok and Malaysia. The African man suggested to the appellant to carry the clothes from

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Bangkok to Malaysia, to which the latter agreed. The appellant argued that SP6 and SP7 who had weighed the packets had stated that it was 18.956kg and 18.9kg, respectively while the

chemist had stated that it was 19197.7g. Hence, it was the appellant's submission that there was a break in the chain of evidence to explain the discrepancies. At the end of the trial, the High Court convicted the appellant of the charge and sentenced her to death. In the present appeal, the issues that arose for the court's determination were (i) whether there was a break in the chain of evidence; and (ii) whether there was failure to appreciate the appellant's defence and cautioned statement that caused a serious non-direction amounting to misdirection.

Held (dismissing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The issue of identity of exhibits is one of finding of facts. Being a question of fact, as a general rule, failure to challenge may be fatal. The challenge must be to the exhibit *per se* and not just as to the weight alone. When it related to exhibit, it is the duty of the prosecution to demonstrate to the court the full history of that exhibit from the time it first came into police custody until it was produced in the court. (para 12)

(2) Once the court is satisfied as to the exhibit and the nexus to the case, the fact that the exhibit was not in the original shape or condition or weight would have less significant probative weight unless it creates reasonable doubt in the mind of the trial judge that the exhibit had no nexus to the case. Even if an exhibit had been lost or destroyed does not mean the prosecution's case would collapse. However, if the chemist report had been secured before the loss or damage, it may not be necessarily so. It all depends on the facts and the central issue will relate to the credibility of witnesses and not the exhibits *per se*. (para 13)

(3) There were sufficient materials to support the charge and the view taken by the trial court on the relevant issues was a reasonable view of the evidence on the record and the court had followed *Mohammad Radhi Yaakob v. PP* and rightly applied the maximum evaluation and beyond reasonable double test. It was a safe decision and appellate intervention was not warranted and the appeal had no merit. (paras 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang warganegara Thai, dituduh atas kesalahan mengedar 18630g dadah berbahaya, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Seorang pegawai kastam ('SP4') yang telah memeriksa teksi yang mana perayu merupakan penumpang, telah menjumpai dua bagasi berkunci di perhentian teksi. Selepas memeriksa, kedua-dua bagasi didapati mengandungi 20 objek segiempat ('paket-paket tersebut') yang dibalut dengan t-shirt. Dalam kenyataan beramaran, yang berbentuk penafian semata, perayu menafikan mempunyai pengetahuan mengenai dadah-dadah tersebut. Menurut perayu, semasa sedang minum di Changloon, dia telah didekati oleh seorang lelaki Afrika yang bertanyakan tujuan lawatannya. Apabila perayu memberitahunya bahawa dia sedang mencari pekerjaan, lelaki Afrika tersebut memberitahunya bahawa dia menjalankan perniagaan baju di Bangkok dan Malaysia. Lelaki Afrika tersebut mencadangkan agar perayu membawa baju-baju tersebut dari Bangkok ke Malaysia, yang mana perayu bersetuju. Perayu menghujahkan bahawa SP6 dan SP7 yang telah menimbang paket-paket tersebut menyatakan bahawa masing-masing adalah 18.956kg dan 18.9kg sedangkan ahli kimia telah menyatakan bahawa ia adalah 19197.7g. Oleh itu, menjadi hujahan perayu bahawa terdapat pemecahan pada rantai keterangan untuk menjelaskan percanggahan-percanggahan. Di akhir perbicaraan, Mahkamah Tinggi mensabitkan perayu atas pertuduhan dan menjatuhkan hukuman mati. Dalam rayuan ini, isu-isu yang timbul bagi pemutusan mahkamah adalah (i) sama ada terdapat pemecahan dalam rantai keterangan; dan (ii) sama ada terdapat kegagalan untuk mempertimbangkan pembelaan dan kenyataan beramaran perayu hingga menyebabkan ketidakarahan yang serius yang terjumlah kepada salah arahan.

Diputuskan (menolak rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Isu identiti ekshibit-ekshibit adalah satu dapatan fakta. Sebagai satu persoalan fakta, secara amnya, kegagalan untuk mencabarnya mungkin memudaratkan. Apabila ia berkaitan dengan ekshibit, adalah tugas pendakwaan untuk menunjukkan kepada mahkamah susur-galur penuh ekshibit daripada ia berada dalam jagaan polis hingga ia dikemukakan di mahkamah.

(2) Apabila mahkamah berpuas hati mengenai ekshibit dan perhubungan dengan kes, fakta bahawa ekshibit bukan dalam bentuk atau keadaan atau berat asalnya akan mempunyai nilai probatif yang kurang melainkan ia membentuk keraguan munasabah dalam minda hakim bicara bahawa ekshibit tersebut tidak mempunyai perhubungan dengan kes. Jika pun satu-satu ekshibit telah hilang atau dimusnahkan tidak bermaksud kes pendakwaan akan gagal. Walau bagaimanapun, sekiranya laporan ekshibit telah diperolehi sebelum kerugian atau kerosakan, ia mungkin tidak sedemikian. Kesemuanya bergantung kepada fakta-fakta dan isu utama akan berkaitan dengan kredibiliti saksi-saki dan bukan ekshibit-ekshibit semata-mata.

(3) Terdapat material-material yang mencukupi untuk menyokong pertuduhan dan pandangan yang diambil oleh mahkamah bicara mengenai isu-isu relevan adalah pandangan munasabah ke atas keterangan pada rekod dan mahkamah telah mengikut *Mohammad Radhi Yaakob v. PP* dan dengan betul mengguna pakai penilaian maksimum dan ujian keraguan munasabah berganda. Ia adalah keputusan yang selamat dan keputusan mahkamah rayuan tidak diperlukan dan rayuan tidak bermerit.

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chin Kek Shen v. PP [2013] 7 CLJ 435 CA ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Lee It Leo v. Regina [1954] 1 LNS 43 HC ***(refd)***
Lim Swee Seng v. PP [1995] 1 SLR 425 ***(refd)***
Munuswamy Sundar Raj v. PP [2013] 1 LNS 183 CA ***(refd)***
Phrueksa Taemchim (Thailand) v. PP [2013] 10 CLJ 1 CA ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Mohd Aszzid Abdullah [2008] 1 MLJ 281 ***(refd)***
Ramachandran v. State of Kerala [Cr. A No. 732 of 2008] ***(refd)***
Sahabuddin and Another v. State of Assam Cr. A No. 629 of 2010 ***(refd)***
Satli Masot v. PP [1999] 2 SLR 637 ***(refd)***
Tan Ong Keong v. PP [2012] 4 CLJ 223 CA ***(refd)***
Tong Kam Yew & Anor v. PP [2013] 4 CLJ 470 CA ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***
Yeong Kia Heng lwn. PP [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 SC ***(refd)***
Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Dangerous Drugs Act 1952, s. 39B(1)(a)
Evidence Act 1950, s. 114(e)

Indian Evidence Act 1872 [Ind], s. 114(e)

Other source(s) referred to:
Nandi Criminal Ready Referencer, 3rd edn, vol 2, p 1731

For the appellant - James George Chelliah; M/s James George & Co
For the respondent - Mohamad Abazafree Mohd Abbas; DPP

[Appeal from High Court, Alor Setar; Suit No: 45A-42-10-2011]

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's appeal against conviction and sentence of death pursuant to a charge of trafficking came up for hearing on 31 July 2013 and on the same day we heard the appeal and dismissed the same. This is our judgment.

[2] The appellant was charged pursuant to s. 39B(1)(a) of the Dangerous Drugs Act 1952 and the charge if translated will read as follows:

> That you on 19 November 2010, at about 1.35 pm, at the vehicle lane no. 2, the Bukit Kayu Hitam Immigration Complex, in the Kubang Pasu District, in the state of Kedah Darul Aman, had trafficked in dangerous drugs cannabis weighing 18630 grams thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under section 39B(2) of the same Act.

[3] The English translation of the petition of appeal as well as the additional petition can be summarised as follows: (i) there was a serious break in the chain of evidence. (ii) there was failure to produce fingerprint evidence to prove identity of the trafficker. (iii) failure to appreciate defence and caution statement that caused a serious non-direction amounting to misdirection.

[4] The learned counsel for the appellant has filed a written submission and on the day of hearing has limited the complaint *inter alia* to the following issues namely: (i) discrepancies in weight, (ii) P32 and P35 - keys were not tendered as exhibits, (iii) no explanation of the seven hours delay of what transpired to the drugs during that period, (iv) no fingerprint evidence and (v) the cautioned statement was not considered in totality. The learned counsel's complaint on these issues in *verbatim inter alia* reads as follows:

(i) that the learned trial judge had misdirected himself when he failed to appreciate the discrepancies in the gross weight of the drugs which had caused a serious break in the chain of evidence (ground 1 in the Additional Petition of Appeal);

(ii) that the learned trial judge had misdirected himself when he failed to appreciate that important exhibits i.e. a key and lock for bag P32 (ground 8 & 10 of the Petition of Appeal); a key for bag P35 (ground 8 of the Petition of Appeal); and the appellant's handbag (ground 2 of the Additional Petition of Appeal) were never marked as exhibits which had caused a serious break in the chain of evidence;

(iii) that the learned trial judge had misdirected himself when he failed to appreciate that SP6 had not given any explanation as to what he did with the drugs for almost 7 hours which had caused a serious break in the chain of evidence (ground 3 of the Additional Petition of Appeal);

(iv) that the learned trial judge had misdirected himself when he failed to appreciate that the investigating officer had failed to request for fingerprint testing although he had received information that the bags belonged to someone else (ground 12 of the Petition of Appeal);

(v) that the learned trial judge erred in law when he dismissed the cautioned statement of the Appellant and the Appellant's defence through her sworn evidence (ground 7 and 11 of the Petition of Appeal).

Brief Facts

[5] The brief facts of the case as adumbrated by the learned counsel for the appellant reads as follows:

On 19-11-2010 at about 1.35 p.m. Custom's officer Nazliyah binti Mat Saad (SP4) was checking taxi PCC 5019 at the Bukit Kayu Hitam Immigration Complex where the appellant was the passenger with 2 luggage bags (P32 and P35) in the taxi booth

A [*sic*]. Both of the said bags were locked (page 35 of the Appeal Record). Upon examination by SP2 [*sic*] and further examination by SP6 of the said luggage bags, 20 four square objects were found wrapped inside t-shirts. Chemist, Puan Marhayani (SP2) had stated that all 20 of the four square objects (hereinafter referred to as "the packets") were wrapped in plastic wherein 16 B of them were further wrapped in gold and white paper and 4 of them in aluminium paper. The said 20 objects, after chemical analysis, formed the subject matter of the charge.

[6] The facts of the case has much similarity to the Federal C Court case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; [2007] 5 MLJ 1 where a charge of trafficking succeeded and the case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 where the charge of trafficking was reduced to possession. (see *Phrueksa Taemchim (Thailand) v. PP* [2013] 10 CLJ 1; Cri.A. W-05-436-2010). D What is important in the instant case and the distinguishing features to drive home the charge of trafficking is that the accused was the only passenger of the taxi and there was no dispute that the bags were placed by the accused in the boot. Her cautioned statement was one of mere denial and it was recorded through the E assistance of a Thai interpreter and the related part reads as follows:

Saya tidak tahu bahawa pada hari tersebut saya membawa barang yang disyaki ganja. Sekiranya saya mengetahui lebih awal saya tak akan melakukan kerja ini. Sebenarnya saya sedang mencari F pekerjaan dan saya datang ke sini (Malaysia) adalah semata untuk mencari. Oleh itu saya cuba mencari peluang untuk bekerja di Malaysia sebagai tukang masak. Semasa saya memasuki Malaysia dan sedang minum di sebuah kedai makan di pekan Changloon, saya telah disapa oleh seorang lelaki Afrika bertanyakan tentang G tujuan saya berada di situ. Saya menjelaskan bahawa saya mahu mencari pekerjaan sekiranya bersesuaian dengan saya. Lelaki Afrika itu memberitahu dia ada menjalankan perniagaan baju di Bangkok dan Malaysia. Dia mencadangkan supaya saya membawa baju tersebut dari Bangkok ke Malaysia memandangkan saya sudah biasa ke Malaysia. Tambah lelaki tersebut beliau ada masalah H dengan pasport dia tidak dapat masuk ke Thailand. Saya bersetuju dengan cadangan itu dan saya telah diberi wang sebanyak RM500.00 sebagai pendahuluan dan RM1500.00 akan diberikan pada hari barang tersebut diterima. Pada 18/11/2010 saya terima dua beg pakaian di stesen bas Bangkok lebih kurang jam 2050hr I (waktu Thailand) dan tiba di Hadyai lebih kurang pukul 0900 hr pada 19/11/2010 (waktu Thai). Dari Hadyai menaiki van dan tiba di pekan Danok lebih kurang jam 1100 hr (waktu Thai). Dari

> Danok saya menaiki teksi melepasi border Thailand ke Malaysia untuk ke pekan Changloon. Saya tiba di kompleks Imigresen Malaysia dan cop pasport di pondok Imigresen Malaysia dan terus ke kaunter pemeriksaan kastam. Seorang pegawai kastam perempuan memeriksa beg pakaian dan saya tidak tahu apa yang ada di dalam beg selain dari baju. Setelah saya pegang dan angkat baju untuk diperiksa dan saya ternampak ada sesuatu yang terjatuh ke dalam beg tersebut. Saya diarahkan membawa 2 beg pakaian dibawa masuk ke pejabat kastam pencegahan. Setelah dibuat pemeriksaan lanjut saya dengar orang sebut ganja. Saya panik dan tidak pernah melihat ganja … Saya memang tidak tahu apa-apa tentang barang yang ada dalam beg pakaian selain baju yang akan dihantar ke pekan Changloon. Saya juga tidak tahu yang beg itu berat kerana saya hanya menarik beg itu dari mula saya terima …

[7] The cautioned statement does not have any sufficient particulars to stand as '*Alcontara* Notice' to enable the prosecution to investigate her version of the story and rebut the same, as propagated in the case of *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705 which the Court of Appeal have dealt with in a number of cases. (see *Munuswamy Sundar Raj v. PP* [2013] 1 LNS 183; [2013] MLJU 373).

Weight

[8] Learned counsel for the appellant says that SP6 and SP7 who had weighed the packets had stated that it was 18.956kg and 18.9kg respectively. The chemist SP2 had stated that it was 19197.70g and complains that the difference in weight was never explained and relies on the case of *Yeong Kia Heng lwn. Public Prosecutor* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 where the court quashed the conviction and sentence when the error in weight of the drugs was only 10g.

[9] The learned Deputy Public Prosecutor vehemently object to the contention of the appellant that there was a break in the chain of evidence and failure to explain the discrepancies entitles the appellant to seek an acquittal. And asserts in the instant case the drugs' markings and weight were made in the appellant's presence and the appellant had signed the exhibit. In addition says that the case of *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383; [2013] 2 MLJ 348 can be distinguished. In the case of *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945 (Federal Court Appeal No. 05-87-05-2012 (B)) the Federal Court held that the

question whether there was a break in the chain of exhibits giving rise to the issue of identity of the drug exhibit is a question of fact and depends on the facts and circumstances of the case.

[10] In our view, both *Zaifull* and *Hasbala* (above) are good authorities and must be followed depending on the facts of the case. In any event, *Zaifull*'s case did not attempt to introduce a new jurisprudence that the moment there is a discrepancy in weight and has not been explained the accused is entitled to an acquittal. Such a proposition did not find favour even before the Singaporean Court of Appeal in the case of *Lim Swee Seng v. Public Prosecutor* [1995] 1 SLR 425 where the majority had rejected the argument that unexplained discrepancies in weight entitles an acquittal. The prudent test expounded in that case is that in cases where there is an allegation of break in the chain of evidence, the issue for the court's determination was whether, on the evidence adduced before the court, any doubt had been raised on the identity of the drug exhibits. (see *Satli Masot v. Public Prosecutor* [1999] 2 SLR 637). *Zaifull* and *Hasbala* had correctly applied the prudent test advocated in the Singaporean case though it may not have been expressed in those words. Any proposition by the appellant to assert that difference in weight and failure to explain can stand as a sole ground for an acquittal must be struck down as it would be against the weight of authorities in respect of the jurisprudence relating to break in chain of evidence and apex court rarely trend into the path of legislators.

[11] In *Zaifull*'s case, the appeal was not just allowed on the sole ground of discrepancy as to the weight of the drugs which was not explained but also the fact that there was discrepancy in the number of 'ketulan or slab'. The Federal Court at para. 32 had this to say:

> [32] We are of the view that in present case, there exist material discrepancies in the gross weight of the cannabis mentioned in the original charge compared to the evidence of PW2. Other than that, there also exist material discrepancy in the number of "ketulan" mentioned in the original charge compared to the number of "ketulan" as testified by PW4, PW8 and PW2. The gross weight and the number of "ketulan" of the drug exhibit certainly go to the identity of the drug exhibit. How else can the identity of the drug exhibit be established. Therefore, any serious discrepancies on the gross weight and the number of "ketulan", unless satisfactorily explained, in our view will go the question of identity of the drug exhibit.

And at para. 35, His Lordship Arifin bin Zakaria, CJ made a pertinent observation and conclusion consistent with the jurisprudence relating to identity of drugs and break in the chain of evidence. The learned Chief Justice had this to say:

> [35] With respect, we could not agree with the prosecution on this issue. We are of the view that, **in the circumstance of this case**, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case. (emphasis added).

[12] It must be asserted that the issue of identity of the exhibits is one of finding of facts. Being a question of fact as a general rule, failure to challenge may be fatal. The challenge must be to the exhibit *per se* and not just as to the weight alone. When it relates to exhibit it is the duty of the prosecution to demonstrate to the court the full history of that exhibit from the time it first came into police custody until it is produced in court. In *Lee It Leo v. Regina* [1954] 1 LNS 43; [1954] 1 MLJ 215 the court stated that:

> The second ground of appeal was that it was not conclusively proved that the Chap Ji Kee schedules produced in Court were the same documents which one of the detectives saw at the time the appellant was apprehended and which were alleged to have been dropped by the appellant. The evidence for the Crown was certainly deficient in that it did not give the history of these documents from the time the detectives took possession of them up to the time of their production in Court, and in some cases this omission might have proved a fatal defect, but in the present case I do not think there is any ground to suspect the documents had been altered in any way while in Police custody, and accordingly I do not think any question of a miscarriage of justice arises in this instance. Prosecuting officers must bear in mind the importance in all cases of leading evidence as to the full history of exhibits, documentary or otherwise, from the time they first came into Police custody until they are produced in Court.

[13] Once the court is satisfied as to the exhibit and the nexus to the case, the fact that the exhibit was not in the original shape or condition or weight has less significant probative weight unless it creates reasonable doubt in the mind of the trial judge that the exhibit has no nexus to the case. Even if an exhibit has been lost or destroyed does not mean the prosecution's case will collapse.

A It all depends on the facts. It may be in drug cases. However, if the chemist report has been secured before the loss or damage it may not be necessarily so. It all depends on the facts and the central issue will relate to credibility of witnesses and not the exhibits *per se*. In *Gunalan Ramachandran & Ors v. PP* [2004] 4 B CLJ 551, the Court of Appeal *inter alia* held:

> [6] In a drug trafficking case, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to C another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that D was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with. The proof of the chain of evidence is only a method of proving that fact. The fact that there is a gap does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. E
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> [7] The chain of evidence is less important during the period it is received back from the chemist until it is produced in court. This is because, there is no law that the exhibit recovered must be produced in court failing which the prosecution's case must F necessarily fall. It may or it may not, again depending on the facts and the circumstances of each case. *Sunny Ang v. PP* [1966] 2 MLJ 195 (FC) (folld). In a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist. So long as there is no doubt that the drug analysed by the chemist is the same one that was recovered in the case and G it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed or the reason for the gap, there is no reason why the prosecution's case should fall. In the instant case, there was no break in the chain of evidence whatsoever, from the day it was seized until the date of trial. The missing exhibits did not contain any drugs. H They were empty plastic packets and a weighing machine. Their existence could be seen from the photographs, not to mention oral evidence.

(See *Tan Ong Keong v. PP* [2012] 4 CLJ 223; *Wan Yurillhami Wan* I *Yaacob & Anor v. PP* [2010] 1 CLJ 17).

[14] The central issue for the court is whether there was any doubt as to the identity of the exhibits. Doubt is always meant to be reasonable doubt, not fanciful doubt or possible doubt. And such doubt should only arise if the history of the exhibit was not satisfactorily explained or the credibility of the witness leading to the exhibit is of suspect etc. All things being equal the prosecution may have the benefit of s. 114(e) of the Evidence Act 1950 unless it is challenged and rebutted. Section 114(e) of the Evidence Act 1950 reads as follows:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> (a) …;
>
> …
>
> (e) that judicial and official acts have been regularly performed.

[15] Support for the above proposition is found in a number of cases. The learned authors of *Nandi Criminal Ready Referencer*, 3rd edn. in reference to s. 114(e) of the Indian Evidence Act 1872 which is *pari materia* to our s. 114(e) at vol. 2, p. 1731 had this to say:

> There is a presumption that a police officer also acts honestly. He cannot be suspected without good grounds therefore - *Aher Raja Khima v. State of Saurashtra* AIR 1956 SC 217. Presumption is available in favour of police officer. A mere statement that requisite procedure was not observed or that statement was recorded under duress or coercion is of no consequence. Presumption that a person acts honestly applies to police officer also - *Devender v. State* (2002) 5 SCC 234: AIR 2002 SC 1661: 2002 Cr LJ 2034. The court cannot start with the presumption that police records are untrustworthy. So when a police officer gives evidence that a certain article was recovered pursuant to the statement of the accused court should believe it unless shown to be unreliable. He cannot be disbelieved either on the ground that the police could not collect the signature of independent witness - *State v. Sunil* (2001) 1 SCC 652; 2001 Cr LJ 504.

[16] It is also well-settled that an apex court should not interfere in the findings of fact of the trial judge unless it is unsafe to convict or law or procedure has been breached. In addition, the Federal Court or in cases where the Court of Appeal is the final arbiter (ie, matters arising from sub-courts) should not interfere with the factual findings recorded by two concurrent courts. There are only few limited circumstances the apex court can interfere in concurrent findings. It must be a case where the assessment of the evidence by the court below is vitiated by an error of law, or procedure or there is a misreading of evidence. In *Ramachandran v. State of Kerala* [Cr. A No. 732 of 2008 - Lexis Nexis) the Supreme Court of India had asserted the importance of finding of facts as well as concurrent findings and had this to say:

> 24. We are not unmindful of the fact that this Court u/art. 136 of the Constitution seldom interferes with the factual findings recorded by two concurring Courts but if this Court is satisfied that the High Court has committed a serious error of law and that there was substantial miscarriage of justice, this Court could interfere with the concurring findings of the High Court and that of the Trial Court. This Court also does not normally enter into a reappraisal or review of the evidence unless the assessment of the evidence by the High Court is vitiated by an error of law or procedure or there was misreading of evidence.
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> 25. Similarly in *Dalbir Kaur v. State of Punjab*, (1976) 4 SCC 158 1976 Indlaw SC 172 the principles for interference were culled out and stated by S. Murtaza Fazal Ali, J as follows:
>
> > Thus the principles governing interference by this Court in a criminal appeal by special leave may be summarised as follows:
> >
> > (1) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;
> >
> > (2) that the Court will not normally enter into a reappraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;
> >
> > (3) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;

(4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;

(5) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence.

26. In the same decision, A.C. Gupta, J concurred but cautioned as follows:

> The decisions of this Court referred to in the Judgment of my learned brother lay down that this Court does not interfere with the findings of fact unless it is shown that "substantial and grave injustice has been done". But whether such injustice has been done in a given case depends on the circumstances of the case, and I do not think one could catalogue exhaustively all possible circumstances in which it can be said that there has been grave and substantial injustice done in any case.

27. Keeping these principles in mind, we have considered the evidence on record and find no exceptional circumstance or reason to disturb a concurrent finding of fact by both the Courts.

[17] The above case clearly demonstrates the recognition of the trial court status as sole arbiter of finding of facts and in cases of concurrent findings the commitment of the apex court not to interfere with what they think should be the finding. If these principles are not strictly adhered to and if the apex court attempts to deal with the issues according to subjective justice lacking jurisprudence, the element of certainty in criminal trials will be lost.

[18] In addition the Court of Appeal is duty bound to consider s. 60 of the Courts of Judicature Act 1964 and in that process the totality of the evidence must be re-looked to ascertain whether there was any substantial miscarriage of justice. And substantial miscarriage of justice under s. 60 of the Act will not arise on the basis the complaint is as to 'weight and failure to explain' when there was no challenge to the exhibit in any material form.

[19] It must be emphasised that appellate interference on finding of facts must be treated with caution and elementary principles including concurrent finding must not be brushed aside or the trite principle that an issue to be dealt with by the appellate court must have been properly ventilated in the court of first instance as well as subsequent stage of appeal must not be forgotten. Failure to do so will compromise the integrity of decision making process of the apex court and will lead to obscure result. And very importantly the jurisprudence that court should not take a cavalier approach to order an acquittal arbitrarily and that too without jurisprudence as well as taking into consideration public interest as a whole, must be adhered to as advocated in the Indian Supreme Court case of *Sahabuddin and another v. State of Assam* Cr. A No. 629 of 2010, where it was stated:

> Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. **Both are public duties of the judge**. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. *For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interests of the society as well.* (emphasis added).

(see *Chin Kek Shen v. PP* [2013] 7 CLJ 435; [2013] MLJU 266).

[20] The other issues raised by the appellant directly and indirectly relates to break in the chain of evidence and we do not see any merits. In the instant case, the appellant was caught red-handed and was not able to rebut trafficking on the balance of probabilities. (see *Phrueksa Taemchim (Thailand) v. PP* [2013] 10 CLJ 1, Criminal Appeal No. W-05-436-2010).

[21] It is well-settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken

by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test. (see *Public Prosecutor v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v. PP* [2013] 4 CLJ 470; [2013] 4 MLJ 888; *Chin Kek Shen v. PP* [2013] 7 CLJ 435; [2013] MLJU 266).

[22] We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

[23] We hereby order so.